Lim Ming Seng & Anor v Yong Foi Chea @ Yong Pei Chee

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–164 OF 1996
KAMALANATHAN RATNAM J
26 JUNE 2002

Civil Procedure *— Striking out — Want of prosecution — Appeal by plaintiff — Validity of writ of summons — Expiry — Whether there was application to extend the life of the writ — Whether claim time barred*

The cause of action in this case concerned the breach of an oral agreement between the plaintiffs and defendant entered into on 28 June 1994. The writ was issued on 27 May 1996. The process server was unable to effect personal service of the writ on the defendant. He made three attempts to do so in June 1997. On 8 September 1997 the plaintiff applied to serve the writ by way of substituted service. The defendant entered appearance on 14 November 1997 and filed his defence and counterclaim on 30 December 1997. Subsequently, the plaintiffs filed two applications to strike out the defendant's defence and counterclaim. The plaintiffs' second application was dismissed by the senior assistant registrar on 21 November 1998 and nothing further was done until the defendant applied to strike out the writ and statement of claim for want of prosecution on 21 August 2001. The deputy registrar allowed the defendant's application on 9 May 2002 and the plaintiffs appealed.

Held, dismissing the appeal with costs:

Before filing the application for substituted service on 8 September 1997, the plaintiffs had not applied to extend the life of the writ which had expired on 26 May 1997. When the writ was served, whether by way of substituted service, or personal service, the writ had expired and it had no validity. This coupled with the fact that the time bar had set in meant that the plaintiffs had lost their right to sue and the right of the defendant had to be protected (see p 107F–H).

[Bahasa Malaysia summary

Kausa tindakan di dalam kes ini adalah mengenai perlanggaran perjanjian lisan yang dibuat pada 28 Jun 1994 di antara plaintif-plaintif dan defendan. Writ tersebut telah dikeluarkan pada 27 Mei 1996. Penghantar saman tidak dapat menyempurnakan penyampaian ke diri writ tersebut ke atas defendan. Beliau telah mencuba sebanyak tiga kali pada Jun 1997. Pada 8 September 1997 plaintif-plaintif telah memohon supaya writ tersebut disampaikan melalui penyampaian ganti. Defendan telah memasukkan kehadiran pada 14 November 1997 dan telah memfailkan pembelaan dan tuntutan balas beliau pada 30 Disember 1997. Selepas itu, plaintif-plaintif telah memfailkan dua

permohonan untuk membatalkan pembelaan dan tuntutan balas defendan. Permohonan plaintif-plaintif yang kedua telah ditolak oleh penolong kanan pendaftar pada 21 November 1998 dan tiada apa yang telah dilakukan selepas itu sehinggalah defendan memohon untuk membatalkan writ dan pernyataan tuntutan kerana tiada pendakwaan pada 21 Ogos 2001. Timbalan pendaftar membenarkan permohonan defendan pada 9 Mei 2002 dan plaintif-plaintif merayu.

Diputuskan, menolak rayuan dengan kos:

Sebelum memfailkan permohonan untuk penyampaian ganti pada 8 September 1997, plaintif-plaintif tidak memohon untuk melanjutkan writ tersebut yang telah luput pada 26 Mei 1997. Apabila writ tersebut disampaikan, sama ada melalui penyampaian ganti atau penyampaian ke diri, writ tersebut telah luput dan tidak sah lagi. Selain itu, masa telahpun luput dan ini bermakna plaintif-plaintif telah hilang hak mereka untuk mendakwa dan hak defendan mesti dilindungi (lihat ms 170F–H).]

Notes

For cases on want of prosecution, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5643–5644.

M Devi (*Leong Ng & Tan*) for the plaintiffs.
Fareed bin Abdul Gafoor (*VM Mohan & Co*) for the defendant.

Kamalanathan Ratnam J:

Facts

The plaintiffs issued out a writ against the defendant on 27 May 1996. The plaintiffs contended that by an oral agreement on 28 June 1994 between them and the defendant, the plaintiffs agreed to buy and the defendant agreed to sell a house with the land, known as Lot No 126, Type 8/SD1, Taman Bandar Baru, Ayer Itam, Pulau Pinang ('the said property') at an agreed price of RM170,000. On the same day, the plaintiffs paid to the defendant a sum of RM10,000 by way of a deposit and as part payment. On 7 October 1994, the defendant's solicitors forwarded to the plaintiffs a letter together with a draft agreement pertaining to the said sale. On 4 January 1995, the plaintiffs then paid the balance of RM7,000 of the 10% deposit. However, by a letter dated 30 March 1995, the defendant's solicitors informed the plaintiffs' solicitors that the said agreement to sell had been revoked and returned the sum of RM17,000 paid as deposit, by way of a cheque. The plaintiffs then replied by way of their letter dated 6 April 1995 and refused to accept the said revocation. The plaintiffs contended that they had been all along willing and able to proceed to conclude the agreement. They therefore sought, by way of this writ, a declaration for specific performance of the oral agreement dated 28 June 1994 together with damages and costs.

The court process server filed an affidavit of non-service on 27 June 1997 in which he maintained that he had made three unsuccessful attempts on 19, 24 and 26 June 1997 to effect service of the writ and statement of claim on the defendant. A

The plaintiffs then on 8 September 1997, applied by way of summons to serve the writ by way of substituted service. Whilst the court file does not show any affidavit of service as having been filed or as to when the writ was served on the defendant, the defendant entered appearance on 14 November 1997 and filed his defence and counterclaim on 30 December 1997. A reply to the defence and counterclaim was filed on 6 January 1998. The plaintiff then filed an application (encl 9) on 27 February 1998 to strike out the defence and counterclaim. As the defendant took a preliminary objection on the application, the learned senior assistant registrar who heard the application accepted the defendant's preliminary objection to strike out encl 9. There was no appeal against this decision to the judge in chambers. Instead, on 16 July 1998, the plaintiff filed another similar application (encl 14) to strike out the defence and counterclaim. Having received written submissions, the learned senior assistant registrar dismissed encl 14 with costs on 21 November 1998. Thereafter, nothing happened to this file. B C D

Then, on 21 August 2001, the defendant applied to strike out the writ and statement of claim for want of prosecution. On 8 February 2002, the learned deputy registrar allowed the defendant's application and struck out the writ and statement of claim for want of prosecution. Being dissatisfied with the said decision, the plaintiffs appealed. On 9 May 2002, I heard the plaintiffs' appeal and dismissed it with costs. The plaintiffs have since appealed against my decision. E

Findings of the court F

At the outset of the appeal, I asked counsel for the plaintiffs whether before filing the application for substituted service on 8 September 1997, the plaintiffs had applied to extend the life of the writ which had expired on 26 May 1997. This is all the more important since the oral agreement was pleaded to have been on 28 June 1994 and limitation has since set in. The plaintiffs' counsel frankly admitted that no application had been made to extend the life of the writ. G

In my view, when the writ was served whether by way of substituted service, or personal service, the writ had expired and it had no validity. This coupled with the fact that the time bar has since set in would mean that the plaintiffs have lost their right to sue. In other words, the right of the defendant has to be protected. I, therefore, dismissed the appeal with costs. H

Appeal dismissed with costs.

Reported by Chew Phye Ken I